State of Michigan
Supreme Court

Appeal from Michigan Court of Appeals
BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

Jenny N. Heinze (fka Glaubius),
Plaintiff-Appellee,
v

John A. Glaubius,
Defendant-Appellant.

SC No. 150206
COA No. 318750
TC No. 2012-004307-DM
Macomb Circuit Court
Hon. Kathryn A. Viviano

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Brief of Defendant-Appellant, John Glaubius

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February 16, 2015

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Statement of Jurisdiction

The Supreme Court has jurisdiction over this appeal pursuant to an order granting leave to appeal dated December 23, 2014. 214a.

Statement of Questions Presented

1. Whether the defendant was merely the "presumed father" of the minor child, see MCL 722.1433(4), or whether he was the "affiliated father," see MCL 722.1433(2), due to certain aspects of the parties' divorce judgment – provisions that "t[ook] as confessed" the complaint allegation that the parties had had one child, that referred to the parties as mother and father, and that provided for child custody and visitation?

- Plaintiff contents defendant is merely a "presumed father."
- Defendant-appellant contends he is the child's "affiliated father."
- The trial court found defendant to be the child's "adjudicated father" based on the divorce judgment.
- The Court of Appeals found defendant to be the child's "presumed father."

2. Whether the plaintiff lacked a remedy under the Revocation of Paternity Act, MCL 722.1431 et seq., for the reason that the divorce judgment precluded her effort to obtain a determination under MCL 722.1441(1)(a) that the minor child was born out of wedlock?

- Plaintiff answers "No"
- Defendant answers "Yes"
- The trial court answered "Yes"
- The Court of Appeals answered "No"

3. Whether the alleged paternity determination in the judgment of divorce was res judicata as to the question of the identity of the child's legal father?

- Plaintiff answers "No"
- Defendant answers "Yes"
- The trial court answered "Yes"
- The Court of Appeals answered "No"

Statement of Facts

1. Introduction and Overview: The Court of Appeals impermissible usurped the authority of the Legislature by re-writing the Revocation of Paternity Act ("ROPA"), MCL 722.1431 *et seq*. The panel below obliterated the distinction between the terms "presumed father" and "affiliated father."

The Legislature gave these terms distinct meanings. The availability of a remedy under ROPA depends on whether defendant is a "presumed father" by his marriage to the child's mother or an "affiliated father" under a court order. The trial court's signature on the divorce judgment recognizing defendant as the child's father changed defendant's status from presumed father to affiliated father. His status as an affiliated father required the result reached by the trial court. The Court of Appeals misinterpreted the statute when it held that defendant remained a "presumed father" after entry of the divorce judgment containing provisions recognizing and treating him as the child's father.

Plaintiff's presentation of facts to the Court of Appeals was inaccurate and incomplete. She acknowledged in her supplemental brief filed with the trial court that "during the marriage, and at the time of the conception of the minor child, the Plaintiff was romantically and intimately involved with another man, that being Joseph Witt." 78a. This was confirmed by her counsel during oral argument on her motion ["At the time that the parties were married, Mrs. Glaubius was involved in an extramarital affair."]. 122a.

Her contention that throughout the marriage and the divorce proceedings she believed defendant to be the child's father is not credible.

Defendant's response to plaintiff's motion for revocation of parentage demonstrates how little credibility plaintiff's assertion should be given. Defendant details evidence demonstrating plaintiff's knowledge that Mr. Witt was the child's father from early in her pregnancy. 70a-71a. These allegations were also presented to the trial court during argument on plaintiff's motion. 161a, 163a. Plaintiff cannot reasonably deny she knew defendant was not the child's biological father when she filed her complaint for divorce on August 1, 2012. She kept that information from defendant and encouraged him to believe he was the child's father. In reliance on plaintiff's words and conduct, defendant fully assumed parental responsibilities.

Although she knew defendant was not the child's biological father, plaintiff signed and filed a divorce complaint alleging: "The parties have had one (1) child born of this marriage, whose names and birthdate is as follows: Zia S. Glaubius, born May 18, 2011." 13a. Plaintiff and defendant negotiated a divorce settlement premised on defendant's belief, encouraged by plaintiff, that he is the child's father. In exchange for defendant receiving a substantial parenting time (40a-47a), plaintiff induced defendant to surrender his interest in the parties' rental properties and agree to an overall property division that favored plaintiff.

Based on the negotiated settlement, plaintiff's lawyer prepared a divorce judgment, obtained defendant's signature approving it as to form and content, and presented it to the trial court for entry. The judgment not only declared the child to be issue plaintiff's marriage to defendant, but granted defendant joint legal custody and a very detailed parenting time schedule making up the largest portion of the judgment. 40a-47a. Notably, the divorce judgment contained a provision called "Parental Designation" stating:

> The parties shall ensure that the designations of "Dad" and "Mom", or their equivalents, are used by the child only to refer to the parties hereto, and not to other third persons. Neither party shall permit any third parties to use such designations when referring to the relationship between the child and any such third parties.

48a.

Unlike plaintiff, defendant was unaware that another man might be the child's biological father. When plaintiff advised defendant of the results of DNA testing, he was devastated. It was like experiencing the death of a child. 102a. However, at no time did defendant file anything with the trial court or take any other formal steps to acknowledge Mr. Witt's paternity of the child. He has asserted throughout these proceedings he is the child's father. 74a, 76a, 102a, 109a, 112a.

2. Factual Background: Plaintiff and defendant were married on August 30, 2008. 15a. The parties' daughter was born on May 18, 2011. *Id*. Based on her date of birth, she was likely conceived in July-August, 2010. As

noted in the *Introduction and Overview* above, Plaintiff acknowledged that "during the marriage, and at the time of the conception of the minor child, the Plaintiff was romantically and intimately involved with another man, that being Joseph Witt." 78a, 122a.

Due to his financial circumstances, defendant relocated from Michigan to his home state of Nebraska in May of 2012 a few months before the divorce action was filed by plaintiff. 29a. After relocated, defendant exercised parenting time with the child in both Michigan and Nebraska. *Id*.

Despite plaintiff's knowledge that Mr. Witt was likely the child's biological father, she filed a complaint for divorce on August 1, 2012, alleging that defendant was the child's father. 13a. In paragraph 4, plaintiff alleged, "The parties have had one (1) child born of this marriage, whose names and birthdate is as follows: Zia S. Glaubius, born May 18, 2011." *Id*. In paragraph 5 of the same complaint, she stated, "Plaintiff does not know of any person, not a party to these proceedings, who has physical custody of the minor child of the parties or claims custody or visitation rights with the child." *Id*.

In paragraph 8 of her complaint, she alleged, "It is in the best interests of the minor child of the parties that physical custody and primary residence of said child be awarded to Plaintiff, JENNY N. GLAUBIUS, and that joint legal custody of the said minor child be awarded to the parties, with Defendant, JOHN A. GLAUBIUS, granted a reasonable parenting time

schedule." 14a. Her prayer for relief also requested that the parties share joint legal custody and that defendant have a reasonable parenting time schedule. *Id*.

During the pendency of the divorce case, both parties participated in the Macomb County Friend of the Court's investigative process. There was an appointment at the Friend of the Court on October 25, 2012, at which both parties appeared and presented their financial information to the Friend of the Court support investigator, Ellen A. Schneider. 16a. Defendant also completed and submitted a detailed financial questionnaire. 17a. This resulted in Friend of the Court support recommendation. 21a.

The parties entered into negotiations and settled in December of 2012. 26a. That settlement was incorporated into a consent judgment of divorce signed by both parties as to "form and substance." 58a.

A hearing on entry of the judgment took place on February 13, 2013. Plaintiff's trial counsel represented to the court that the parties "are in agreement on all issues…." 26a. Included in the agreement deviated from the Michigan Child Support Formula. As explained by plaintiff's counsel:

> The parties entered into an agreement regarding custody, parenting time and to provide for transportation to and from the State of Nebraska; both for him and for the minor child, as the child gets older. Taking into consideration the cost involved in the limited support he would be paying to foster that relationship, the parties agreed, as a result of the expense, that he wouldn't be paying child support at this time.

27a-28a.

The trial court questioned plaintiff about the proposed deviation. Plaintiff confirmed that the deviation was in the best interests of the child because it preserved defendant's financial ability to pay for the travel necessary to exercise his parenting time. 29a-30a. Based on plaintiff's testimony, the trial court granted the deviation request. 30a.

On custody, the judgment provided that "to ensure a stable loving relationship with both parents, the legal custody, care, education and maintenance of the minor child, to wit: Zia S. Glaubius, born May 18, 2011, shall be jointly granted to the parties, Plaintiff, JENNY N. GLAUBIUS, and Defendant, JOHN A. GLAUBIUS…." 37a. Plaintiff was given "physical custody and primary residence…." *Id*.

The judgment recognized that although defendant was residing in Nebraska, "Defendant-Father's time with the minor child is important to both he and the child." 39a. There is a separate provision in the judgment stating, "The parties shall ensure that the designations of 'Dad' and 'Mom', or their equivalents, are used by the child only to refer to the parties hereto, and not to other third persons." 48a.

The parenting time schedule was exceptionally detailed. In single-spaced text, it consumed pages 6-11 of the judgment, concluding at the top of page 12. 41a-47a. It not only provided for current parenting time, but also prescribed a schedule for the period after the child reached the age of 5 years. At the time of the judgment, she was only 22 months old. 30a.

The judgment contains several "acknowledgement" clauses stating that "its terms are being freely entered into of his/her own volition" and "Each has executed this Judgment with the express intention of being bound to the terms thereof…." 55a-60a. It includes a mutual release clause stating that "each of the parties hereby release the other from any cause of action that either may have against the other for any incident which may have occurred prior to the entry of this Judgment of Divorce, whether that claim be founded in contract, tort or any other basis …." 54a.

In response to questioning by her trial counsel when the judgment was entered, plaintiff verified that the proposed divorce judgment contained both her signature and that of defendant. 32a. She then acknowledged that she was "bound by the terms contained in the Judgment of divorce" and that she could not "come back next week or next month and say I've changed my mind." *Id*.

3. The Revocation of Paternity Motion: Plaintiff did not come back "next week or next month," but she returned to court on June 10, 2013, just 117 days after she agreed under oath to be bound by the February 13, 2013, divorce judgment. 2a, 59a.

Plaintiff claimed in her motion she did not question defendant's paternity of the child until, post-divorce, "it was noted to Plaintiff that the minor child does not bear any physical resemblance to the Defendant…." 60a. Yet in her supporting brief, she admitted to having an "intimate

relationship" with Joseph Witt when the child was conceived. 63a. Plaintiff further explained her tardy discovery that the child might not be plaintiffs, stating, "After the Judgment of Divorce had been entered, a family member of the Plaintiff approached the Plaintiff and made the observation that Zia did not bear any physical resemblance to the Defendant, John Glaubius." 64a.

That "discovery" led plaintiff to contact Mr. Witt and request he submit to a DNA paternity test. 64a. The results of the test claimed it was a 99.999 percent probability that Joseph Witt was the biological father of Zia S. Glaubius. 64a.

On May 19, 2013, plaintiff telephoned defendant to tell him he was not the child's father. 60a. Under the agreed-upon terms of the divorce judgment, defendant's parenting time was to expand to include overnights when the child reached her second birthday. 41a. Plaintiff's telephone call to defendant was the day following the child's second birthday when overnight parenting time was to commence.

Defendant was stunned by the allegation he was not the child's father. He responded emotionally in an email to plaintiff and her trial counsel to request he be removed from the child's birth certificate. 113a. Upon considering the enormity of the matter, defendant promptly contacted plaintiff's counsel to advise that he did not wish to surrender his parental rights to Zia. 66a, 80a. At no time did defendant file anything with the trial

court or make any formal statement acknowledging Witt's paternity of the child.

On June 10, 2013, plaintiff filed her Verified Motion for Revocation of Parentage with an affidavit and supporting brief. 2a, 59a, 63a. She acknowledged being "intimately involved" with Joseph Witt during the marriage and particularly at the time of the child's conception. 60a, 63a, 78a. Nonetheless, she denied suspecting that Witt was the child's father until after the divorce judgment was entered affirming that she and defendant were the child's parents. 63a.

Plaintiff's motion further alleged that DNA testing done less than three months after the divorce judgment proved that Joseph Witt was the child's biological father. 60a. On that basis, plaintiff alleged she was entitled to a court determination that defendant was not the child's father under Section 11 of the Revocation of Paternity Act (ROPA), MCL 722.1441. To support her motion, she alleged that defendant was a "presumed father" under ROPA whose paternity could be revoked under MCL 722.1441(1)(a)(i)-(iv). 65a-67a. Plaintiff also alleged under MCL 722.1443 (Section 13 of ROPA) that it is in the best interests of the child to determine that the child was not issue of the parties' marriage. 67a-68a.

Defendant retained counsel, Mr. Feringa, and filed a response and supporting brief opposing plaintiff's motion. 70a, 73a. Defendant denied that plaintiff only learned of Mr. Witt's alleged paternity of the child after entry of

the divorce judgment. He asserted that plaintiff and Witt knew during plaintiff's pregnancy that Witt may be the child's father. 70a-71a. Defendant's response itemized the factual allegations upon which he based his belief, including:

> a. That on or about October, 2012, prior to the divorce being started, Plaintiff introduced Zia as Joe Witt's child to Joe's family at a funeral.
> b. That after the divorce was initiated, but prior to the entry of the Judgment, Plaintiff told Joe Witt that Zia was his.
> c. That, upon present information and belief, there was significant and frequent email communication between Joe Witt and Plaintiff regarding the child and communication relating to Joe being the father of the child.
> d. That Defendant was not privy to this information until after being informed that DNA testing suggest that Witt may be Zia's father.
> e. That attorney Julie Gatti, Nicole Witt's counsel is prepared to testify that during their FOC support recommendation, in January, 2012, that Joe Witt disclosed that he had another child other than those issue of his marriage.
> f. That, upon present information and belief, Ms. Nicole Witt, whose divorce was entered with this court on May 30, 2012, would be able to testify that she had knowledge that Joe Witt assumed that Zia was his child.

71a.

Defendant also challenged plaintiff's entitlement to relief under ROPA. Defendant argued that Section 11 of ROPA, MCL 722.1441, was inapplicable. Once the divorce judgment determined him to be the child's father, he ceased being a "presumed father" as that term is defined at MCL 722.1433(4). Instead, he became an "affiliated father," which is defined as "a man who has been determined in a court to be the child's father." MCL 722.1433(2). 71a.

4. Trial Court Proceedings: Plaintiff's motion was initially heard by the trial court on June 24, 2013. It was adjourned to August 13, 2013, to allow for the submission of supplemental briefs. 2a-3a. No transcript was available for the June 24 proceedings. On that date, counsel met with the trial court in chambers given the sensitive subject of plaintiff's motion. Then, based on the recollection of defendant's trial counsel, brief proceedings were on the record to allow the trial court to formally request supplemental briefs and set the adjourned date.

Plaintiff's supplemental brief, dated August 6, 2013, continued plaintiff's assertion that defendant was merely a "presumed father" not an "affiliated father." 82a. Plaintiff maintained that her request for revocation of paternity could be properly filed under Section 11 of ROPA. 83a. Plaintiff also argued that even if defendant were an affiliated father, a child's mother is always allowed to bring an action to have her child declared "born out of wedlock." 89a.

In response to a question apparently raised by the trial court during the June 24 chambers conference, plaintiff denied that it was necessary to set aside the divorce judgment in order to grant relief under ROPA. 90a-91a. Plaintiff did not deny that the divorce judgment served as a determination of paternity.

Defendant filed his supplemental brief on August 6, 2013. 3a, 93a. Defendant more fully described the evidence supporting his assertion that

both plaintiff and Witt knew that Witt was the child's father during plaintiff's pregnancy. 94a-97a. Defendant denied that ROPA provides the court with authority to grant plaintiff's requested relief. 97a. If the court found it had authority under ROPA to act, defendant asserted that it should not revoke his paternity because plaintiff is estopped from requesting such relief and doing so would be contrary to the child's best interests. 97a.

Defendant again argued that once the divorce judgment was entered naming Zia a child of the marriage, he ceased being a "presumed father" under ROPA and became an "affiliated father" because he was "determined in a court to be the child's father." MCL 722.1433(2). Therefore, Section 11 of ROPA does not apply and plaintiff cannot be granted her requested relief. He asserted that without a remedy under ROPA, plaintiff's only option was to seek relief from the divorce judgment under MCR 2.612. 99a.

Defendant also raised the defense of *res judicata*, asserting that plaintiff cannot disavow paternity after it was decided in the divorce action. He argued:

> This issue has been litigated. This court has determined the paternity of this child and has adjudged John Glaubius to be Zia's father. The Court should apply the doctrine of res judicata to this issue and deny Plaintiff's motion to revoke paternity absent her showing of proper grounds under MCR 2.612(C)(1).

100a.

Defendant further claimed that plaintiff's motion was barred by the doctrine of equitable estoppel. He cited *Johnson v Johnson*, 93 Mich App

415; 286 NW2d 886 (1979), *Nygard v Nygard*, 156 Mich App 94; 401 NW2d 323 (1986), and *Johns v Johns*, 178 Mich App 101; 443 NW2d 446 (1989), to support his position this doctrine estops a husband from, post-divorce, denying paternity of a child born during the marriage. Therefore, the child's mother is similarly estopped. 100a-101a.

Defendant's final argument was that it would not be in the child's best interests to revoke his paternity after consideration of the factors in Section 13 of ROPA, specifically those found at MCL 722.1443(4). 102a-104a.

On August 13, 2013, the trial court heard oral argument from counsel on plaintiff's motion. No testimony was taken. Upon questioning by the trial court, plaintiff's counsel argued that even after a determination in a divorce judgment that a child was born to the parties during the marriage, the mother's husband remains merely a "presumed father" under ROPA. 130a, 132a-134a. Plaintiff's counsel then acknowledged that entry of a divorce judgment naming the child as a child of the parties is a determination of paternity, even if it can be challenged later. 135a-136a. It was further acknowledged by plaintiff's trial counsel that no explicit provision in ROPA provides for setting aside a divorce judgment:

> THE COURT: Okay. But, we all agree that there is no explicit provision in this statute that provides for the setting aside of a Judgment of Divorce where custody, parenting time and child support are at issue. It definitely contemplates an Order of Filiation.
>
> MR. MILLER: Correct.

137a.

Defendant's counsel responded that the legislative analysis attached as an exhibit to plaintiff's supplemental brief verifies that ROPA was not intended to address revocation of a paternity determination made previously in a divorce judgment. That can be done only before entry of the judgment just as has been true under the common law. 148a-149a.

Defendant's counsel then went through the history of the evidentiary rule prohibiting spousal testimony of non-access to support a challenge to the husband's paternity of a child born during the marriage (Lord Mansfield's Rule), Michigan's abrogation of that evidentiary rule in *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977), and the requirement that requests to disestablish the husband's paternity be made before entry of a divorce judgment determining the child to be issue of the marriage. 153a-154a.

Next, defendant's counsel explained that the reason a mother's husband is called a "presumed father" during the marriage, but an "affiliated father" after entry of the divorce judgment. Before entry of a divorce judgment, the presumption of the husband's paternity may still be rebutted. During that time frame, the Legislature under Section 11 of ROPA allowed certain parties under certain circumstances come to court to rebut the presumption of the husband's paternity of a child born during the marriage. However, after entry of a divorce judgment determining the husband's paternity, that presumption is no longer rebuttable and the husband

becomes an "affiliated father." Any proceedings under ROPA dealing with an affiliated father must be brought under Section 9. 156a-159a.

Defendant's counsel next addressed the *res judicata* and equitable estoppel arguments made in his supplemental brief. 159a-164a. He then concluded by noting that the best interests factors on which a court may refuse to revoke a paternity determination under ROPA are consistent with those that would apply to equitable estoppel. 165a-166a.

The trial court responded with questions for both attorneys and then identified the central issue as being whether ROPA applies to the facts before it – an attempt by a party post-divorce to revoke a paternity finding made by the court pursuant to an agreed-upon divorce judgment. 168a-172a. If the answer is yes, the trial court indicated that it would set the case for an evidentiary hearing. 172a.

5. Trial Court Ruling: The trial court did not rule from the bench on August 13, but instead issued a written opinion and order dated October 4, 2013. The trial court first summarized the factual and procedural background before addressing the legal issues. 197a-198a.

On the legal issues, the trial court first determined that defendant was no longer merely a "presumed father" under ROPA. Instead, the judgment adjudicated him to be the child's father. Therefore, Section 11 of ROPA did not apply and plaintiff could not be granted relief under that provision . Instead, she "must first establish that she is entitled to relief from the

judgment of divorce." 199a. The trial court analyzed plaintiff's allegations in MCR 2.612(C)(1)(a)-(f) and found no basis to grant relief from the divorce judgment. 199a-200a.

The trial court determined that plaintiff identified no other provision in ROPA that would entitle her to the requested relief. The court held there are "no provisions in the Act which even arguably provide for setting aside a judgment of divorce or an adjudication of paternity contained within a judgment of divorce." 200a. "Absent any authority allowing a party to challenge a judgment of divorce under the Revocation of Paternity Act, this Court shall not legislate from the bench and construe the Act as providing for such relief." 201a.

The trial court also addressed defendant's argument that *res judicata* barred plaintiff's request for relief. The court held that because the parties agreed in the judgment that defendant was the child's father and neither party appealed that judgment, "issue preclusion applies and bars the parties from relitigating the issue." [citing and quoting from *Hawkins v Murphy*, 222 Mich App 664, 672; 565 NW2d 674 (1997)]. 201a. Having determined there was no authority to revoke paternity, the trial court declined to address the best interests issues. 201a-202a.

6. The Court of Appeals Decision: Plaintiff claimed an appeal by right from the trial court's opinion and order. After briefing and oral argument, the Court of Appeals on July 15, 2014, issued a published

decision reversing the trial court and remanding for further proceedings under ROPA. 203a-212a.

The Court of Appeals held first that defendant was a "presumed father" not an "affiliated father" under ROPA. 209a. This was a key holding because, as acknowledged by the Court of Appeals, "no express provision is made for setting aside an order establishing a man as an affiliated father where the man participated in the court proceedings determining his paternity. See MCL 722.1439(1)." 206a. Were defendant an affiliated father under ROPA, plaintiff would lack a remedy and the trial court would be affirmed.

The Court of Appeals based its classification of defendant as merely a presumed father on its erroneous view that "this particular divorce judgment was not a determination of defendant's fatherhood and thus not an order establishing him as an affiliated father." 208a. The panel below failed to address plaintiff's assertion of defendant's paternity her divorce complaint and that defendant participated in the proceedings the proceedings to determine custody, parenting time, and child support. The panel also failed to address the provisions in the judgment determining defendant to be the child's father, including a grant of joint legal custody and parenting time.

The Court of Appeals next held that the divorce judgment was not a final determination of defendant's paternity because the trial court retained jurisdiction to modify provisions related to custody, support, and parenting time. 208a-209a. As such, the ROPA provision permitting an action at any

stage of the proceedings applies to post-judgment proceedings as well as proceedings prior to entry of a final judgment. In so holding, the panel ignored long-established Michigan law that a determination of paternity in a divorce judgment is a final determination and is not among the issues subject to modification during ancillary post-divorce proceedings. It also ignored established law defining what constitutes "proceedings."

Finally, contrary to established case law, the Court of Appeals determined that doctrine of *res judicata* did not prohibit plaintiff from attacking a paternity determination made in their divorce proceedings.

Defendant sought reconsideration of the Court of Appeals decision. Reconsideration was denied in an order dated August 26, 2014. Defendant then applied for leave to appeal to this Court on October 6, 2014. This Court granted leave to appeal in an order dated December 23, 2014.

Standard of Review

The issues in this appeal are questions of law. Questions of law are reviewed on appeal de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004).

Argument

A. Defendant is the child's "affiliated father" pursuant to MCL 722.1433(2) based on the parties' divorce judgment that "t[ook] as confessed" the complaint allegation that the parties had had one child, referred to the parties as mother and father, and provided for child custody and visitation.

1. Introduction: The Court of Appeals accepted plaintiff's unsupported argument that defendant is merely a "presumed father" as that term is defined in ROPA. Section 3 of ROPA, MCL 722.1433, defines the actors in a ROPA proceeding. Under MCL 722.1433(4), a "presumed father" is "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." It is not disputed that defendant, during his marriage to plaintiff and continuing until entry of the divorce judgment on February 13, 2013, a "presumed father."

However, once the divorce judgment was entered determining that defendant is the father of the child born during the parties' marriage, defendant became more than a mere "presumed father." Upon entry of the judgment, defendant became an "affiliated father. Under MCL 722.1433(4), an "affiliated father" is "a man who has been determined ***in a court*** to be the child's father." [Emphasis added.]

If defendant is the child's affiliated father, MCL 722.1441, which permits revocation of a presumed father's paternity, is inapplicable. That leaves only MCL 722.1439, which governs revocation of an affiliated father's paternity. Subsection (1) of that Section permits a motion to revoke an affiliated father's paternity only where "paternity was determined based on the affiliated father's failure to participate in the court proceedings" Defendant participated in the divorce proceedings by agreement of the parties as ratified by the court. Therefore, MCL 722.1439 also provides no remedy.

2. Order of Filiation/Paternity Order: ROPA defines "order of filiation" as "a judicial order establishing an affiliated father." MCL 722.1433(5). The statute doesn't say it must be a judicial order under the Paternity Act or a judicial order under this Act. ***Any*** judicial order by a court of competent jurisdiction declaring a man "to be the child's father" is an order determining filiation. There is no other way to read the statute.

Plaintiff argued below that an order of filiation emanates only from an action under the Paternity Act, MCL 722.711 *et seq*. The ROPA definition of that terms contains no such restriction. However, if it could be argued that a paternity determination in a divorce judgment isn't strictly an "order of filiation," ROPA also recognizes that paternity may be determined in several other ways. Specifically, MCL 722.1443(2)(b) states that a court may revoke

paternity determined by "order of filiation *or a paternity order*." [Emphasis added.]

In its use of the phrase "or a paternity order, the Legislature recognized that a "paternity order" is something distinct from an order of filiation. Among orders that logically qualify as a "paternity order" are provision in divorce judgments determining that a child born during a marriage is a product of that marriage. In other words, the husband is the child's father. Under rules of statutory construction, the term "paternity order" cannot be mere surplus language or another way to state "order of filiation."

There are few stronger maxims of statutory construction than the requirement that every word of a statute be given meaning and none rendered nugatory or said to be repetitive. *Koontz v Ameritech Services, Inc*, 466 Mich 304; 645 NW2d 34 (2002). The Legislature does not repeat itself and, when it mentions two separate things, it means just that, they are two separate things. *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d 164 (1999).

The Court of Appeals acknowledged that "any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of" ROPA. 207a. The panel, in its only legally correct ruling, rejected plaintiff's

argument that that an order of filiation may only arise from the procedures prescribed in the Paternity Act.

3. Divorce Judgment as Determination of Paternity: A provision in a divorce judgment treating a child born during the marriage as issue of that marriage constitutes a judicial determination of paternity. *Hackley v Hackley*, 426 Mich 582, 585; 395 NW2d 906 (1986) ["A support order arising from a divorce decree constitutes an adjudication of paternity and establishes the defendant's duty of support"]. *Hackley* remains good law. There have been only two decisions distinguishing *Hackley*, and neither supports plaintiff's position nor the Court of Appeals decision that a divorce judgment cannot be a paternity determination.

In *Opland v Kiesgan*, 234 Mich App 352; 594 NW2d 505 (1999), it was held that where parties agree post-divorce to set aside a finding in the divorce judgment that the husband is the father of a child born during the marriage, *res judicata* does not bar them from entering into such an agreement to amend the judgment. In *Opland*, the amendatory order revoking the husband's paternity was "was based on the uncontested stipulation of Opland [mother] and Craft [mother's former husband] that although they were married at the time Stephanie [child] was conceived, they were separated at that time and had no opportunity for any sexual relationship." *Id*, at 357. In the instant case, there is no stipulation to amend the judgment and revoke defendant's paternity. Nor were plaintiff

and defendant separated when the child was conceived. Therefore, this case resembles *Hackley*, not *Opland*.

The second decision distinguishing *Hackley* is *Dept of Social Services v Franzel*, 204 Mich App 385; 516 NW2d 495 (1994). There, the request for relief from a stipulated order of filiation came ***while the action itself was still pending***, not in ancillary post-judgment proceedings. As explained by in *Franzel*, at 390:

> [D]efendant's motions were brought, not a prior proceeding. These parties are involved in '*res litigious*,' things that are in litigation; not *res judicata*, a prior final judgment that is conclusive of the parties' rights. In other words, this matter has not been finally decided and the proceedings are ongoing.

Until the litigation is concluded by entry of a final order of the type that permits an appeal by right, a stipulation on paternity may be challenged. After a final order is entered, *res judicata* bars relitigation of paternity. Here, the divorce judgment was final. All issues were conclusively resolved. Nothing was left open. This case his like *Hackley*, not *Franzel*.

The trial court's February 13, 2013, judgment of divorce qualified as either an order of filiation or a paternity order. It declares defendant to be Zia's father. Upon entry of the judgment, defendant became more than Zia's "presumed" father. He is now her "affiliated" father. On this basis alone, plaintiff's claim for relief under Section 11 of ROPA, MCL 722.1441, fails. Section 11 applies only to actions involving "presumed fathers." MCL 722.1435(3).

Had plaintiff sought relief a few months earlier before entry of the divorce judgment, while defendant remained merely a "presumed father," she could attempt to prove her case under Section 11. She may not ultimately have prevailed given the many additional requirements of Section 11 and the best interests factors in Section 13 (MCL 722.1443), but the trial court would have given her an evidentiary hearing to prove that she was entitled to the requested relief.

4. Section 9 of ROPA Not Applicable: Nor does plaintiff have a claim under Section 9 of ROPA. Section 9 "governs an action to set aside an order of filiation." MCL 722.1435(2). As the Court of Appeals acknowledged, a court finding in a divorce judgment that a child born during the marriage is issue of that marriage may qualify as an order of filiation. However, plaintiff never sought relief under Section 9 in the trial court. In her arguments below, she denied that Section 9 applied on these facts. Therefore, any claim plaintiff may have under Section 9 was not addressed by the trial court nor it presented for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

Were Section 9 were at issue, plaintiff fares no better under its terms than under Section 11. Section 9 recognizes and codifies the common law *res judicata* bar against relitigating a court's prior paternity determination. This section of ROPA fully follows *Hackley* and *Cogan*. Once paternity is determined in a proceeding involving the participation of the affiliated father,

neither the mother, the alleged father, nor the affiliated father have standing under ROPA to challenge that determination.

It is only where "paternity was determined based on the affiliated father's ***failure to participate*** in the court proceedings" that a party "may file a motion with the court that made the determination to set aside the determination." MCL 722.1439. [Emphasis added.] Defendant participated in the divorce proceedings that resulting in the paternity determination. While he did not answer plaintiff's divorce complaint, he participated in negotiating its terms, including those related to custody, parenting time, and support of the child. As plaintiff testified under oath when the judgment was entered, it bears defendant's signature approving all terms "as to form and substance." 31a-32a. Defendant also participated by appearing at the Friend of the Court for the child support investigation and completing and submitting a detailed questionnaire containing financial and other information. 16a-22a.

Because of defendant's participation, this was not a case where "paternity was determined based on the affiliated father's failure to participate in the court proceedings." Paternity was determined based on plaintiff's allegations, defendant's expressed agreement with those allegations by approving the divorce judgment, and the trial court's ratification of the parties' agreement. Once included in a judgment by agreement, these provisions become binding on the parties and fully

enforceable by the court. *Aussie v Aussie*, 182 Mich App 454; 452 NW2d 859 (1990).

Not only does Section 9 codify the prior case law barring re-litigation of paternity once it has been established by court order, it carves out an exception only for true default cases where the father failed to participate in the proceedings that led to the paternity determination. That narrow exception does not apply here. No remedy is available to plaintiff under Section 9.

5. Conclusion: The Revocation of Paternity Act fails to provide a remedy to plaintiff. Upon entry of the divorce judgment, defendant was no longer a presumed father. No relief may be granted under Section 11. As an affiliated father who participated in the proceedings that resulted in the paternity determination, Section 9 is similarly unavailable to plaintiff.

ROPA preserves the common law prohibition against re-litigation of paternity once it has been determined by entry of a court order, including in a divorce judgment. Plaintiff may have been able to assert a Section 11 ROPA claim if she sought to rebut defendant's presumption of paternity ***during the marriage or while divorce proceedings were pending***. Once there was a provision in the divorce judgment declaring the child to be "of the marriage," this case fell outside ROPA. Plaintiff's only possible remaining remedy, a remedy she voluntary decided to forego, was a motion for relief form the judgment under MCR 2.612. The Court of Appeals erred

by reading into ROPA a remedy not provided by the Legislature. The trial court should be affirmed.

B. Plaintiff lacks a remedy under the Revocation of Paternity Act, MCL 722.1431 et seq., for the reason that the divorce judgment precluded her effort to obtain a determination under MCL 722.1441(1)(a) that the minor child was born out of wedlock.

1. Introduction: Plaintiff asked each court hearing this matter to legislate from the bench and read into ROPA a remedy not stated in the statute. The trial court declined. The Court of Appeals granted plaintiff's request. This Court should exercise the same judicial restraint demonstrated by the trial court. It is improper to read into the statute a remedy not provided by the Legislature.

Plaintiff argued below that the law related to paternity determinations prior to ROPA was "ripe for legislative change." On that, most experienced family law practitioners can agree. However, ROPA was a limited expansion of the ability to revoke a prior paternity determination. It did not open the floodgates to all manner of litigation to revisit paternity of a child.

The Court of Appeals held at pages 7-8 of its opinion that because a court in a divorce action retains authority to modify custody, support, and parenting time, the proceedings were continuing and that a motion under ROPA could be brought at "any stage" of the proceedings. In so ruling, the Court of Appeals confused the concept of *continuing jurisdiction* and *continuing proceedings*. While a court granting a divorce involving minor

children retains *continuing jurisdiction* to address child-related issues, it does so in *ancillary proceedings*. The divorce proceedings themselves conclude with entry of a final order, typically a divorce judgment.

2. ROPA Remedies are Limited: ROPA allows a court to set aside a previously executed acknowledgment of parentage within limited time frames based on the age of the child and how long ago the acknowledgment was signed. MCL 722.1437. ROPA also permits actions to rebut the marital presumption of paternity under certain limited circumstances. MCL 722.1441. However, nowhere in Section 11 is any mention made of the right to seek relief from a determination of paternity in a divorce judgment after the divorce case is concluded by entry of a judgment. Rebutting a mere presumption that the mother's husband is the father of a child is not the same as attacking a provision in a divorce judgment determining the husband to be father of a child born during the parties' marriage.

Neither plaintiff nor the Court of Appeals recognized the considerable difference between a rebuttable presumption and a judicial determination. It does not matter that the judicial determination was based on the agreement of the parties. Once the judge signs the divorce judgment, its terms become judicial determination fully enforceable by the court.

The trial court's determination that ROPA did not grant plaintiff the relief she sought was not a frustration of legislative purpose. The Legislature, well aware of the iron gate (*Girard v Wagenmaker*, 437 Mich

231; 470 NW2d 372 (1991)) blocking the path of persons in the position of plaintiff and Mr. Witt, opened that gate only part way. There is a time to seek that the remedy of revocation of paternity. That time is ***before*** entry of judgment of divorce. Once that time is gone, so is the remedy. Plaintiff played fast and loose with the truth and participated in entry of a divorce judgment containing a paternity determination she knew was false. Her remedy is now gone.

ROPA was enacted to grant certain limited rights that did not exist at common law. Statutes in derogation of common law must be narrow construed. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981).

ROPA expanded legal standing for biological fathers to establish paternity of their children. The intent was to bypass the requirement in the Paternity Act, MCL 722.711 *et seq*, that there be a prior determination that a child conceived or born during the mother's marriage is not issue of the marriage. ROPA was a long-awaited response to this Court's decision in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991).

In *Girard*, the husband and wife remained married, no divorce action was pending, and there was no divorce judgment finding the husband to be (or not to be) the child's father. ROPA was narrowly intended to correct the *Girard* problem. Correcting *Girard* did not require authorization of post-divorce actions by any of the parties (mother, former husband, or biological

father) to set aside the paternity determination made in a divorce judgment. Addressing the *Girard* problem required only that ROPA permit a remedy during the marriage or while divorce proceedings were pending.

Given the limited purpose of ROPA, nothing in the statute expressly authorizes an action or motion to set aside provisions in a divorce judgment treating the husband as the father of a child born during the marriage. The trial court correctly found that post-divorce remedies are not mentioned anywhere in ROPA. The Court of Appeals improperly read into the statute a post-divorce remedy which does not exist.

3. Divorce "Proceedings" End with Judgment Entry: The court rules create a clear distinction between "actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support" in MCR 3.201(A)(1) and proceedings that are "ancillary or subsequent to" the aforementioned actions such as those relating to "custody of minors" in MCR 3.201(A)(2)(a). Plaintiff's motion to revoke paternity was, as determined by the Court of Appeals in FN1 of its decision, an ancillary proceeding concerning custody from which there is an appeal by right. The motion was not, per MCR 3.201, part of the divorce proceedings.

"Black's [Law Dictionary] defines 'proceeding,' in pertinent part, as '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment' . . .

." *People v Kissner*, 292 Mich App 526, 536; 808 NW2d 522 (2011) [rejecting argument that signing of the motion and affidavit constituted "proceeding"], *lv den* 490 Mich 893 (2011). See also, *Harbor Tel 2103, LLC v Oakland Cnty Bd of Comm'rs*, 253 Mich App 40, 60; 654 NW2d 633 (2002). "Accordingly, the term 'proceeding' encompasses the entirety of a lawsuit, from its commencement to its conclusion." *Kissner*, 292 Mich App at 536.

An action or proceeding is concluded or terminated upon the entry of a final judgment. See, *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 534; 164 NW2d 19 (1969); *State v Iron Cliffs Cnty*, 54 Mich 350, 408; 20 NW 493 (1884) ["A judgment lawfully rendered ends the controversy, but nothing else can."] If the divorce proceedings between the parties constituted "an action for the support, custody, or parenting time of the child," those proceedings were concluded and closed when, on February 13, 2013, the trial court entered the parties' judgment of divorce.

No "action for the support, custody, or parenting time of the child exist[ed] at any stage of the proceedings" when plaintiff filed her motion to revoke defendant's paternity. She could not proceed by motion. The Court of Appeals erred when it held that because a motion under the act may be brought at "any stage" of the proceedings, it may be brought post-judgment. The correct reading of the statute, consistent with the court rules and existing case law, precludes moving to revoke paternity after entry of a judgment of divorce that either declares the husband to be the child's father

or, given the strong presumption of paternity, fails to expressly exclude the mother's husband as the biological father of the child.

4. Conclusion: The divorce proceedings were concluded with entry of the judgment of divorce. There were no "proceedings" pending when plaintiff filed her motion under ROPA. Because the proceedings had already been concluded, plaintiff lacked standing to seek relief under ROPA. The Court of Appeals determination that a motion for relief under ROPA may be filed post-divorce is erroneous and should be reversed.

C. The paternity determination in the judgment of divorce is res judicata as to the question of the identity of the child's legal father.

1. Introduction: It has long been Michigan law that a husband or wife could rebut the presumption of the husband's paternity of a child born during the marriage only during a pending divorce case, not post judgment. Before entry of the divorce judgment, to disestablish the husband's paternity of a child conceived or born during the marriage, the court must make a finding by clear and convincing evidence that the child is not issue of the marriage. *Barnes v Jeudevine*, 475 Mich 696, 704-706; 718 NW2d 311 (2006). Once the divorce judgment is entered, the presumption of paternity becomes irrebuttable. *Rucinski v Rucinski*, 172 Mich App 20; 431 NW2d 241 (1988).

A divorce judgment failing to expressly exclude the husband as the father of a child conceived or born during the marriage serves as a final

court determination of the husband's paternity of the child. *Hackley v Hackley*, 426 Mich 582; 395 NW2d 906 (1986). The judgment is *res judicata* on the question of paternity. Both parties are estopped from challenging it. *Cogan v Cogan*, 119 Mich App 476; 326 NW2d 414 (1982).

2. ROPA Consistent with Prior Law on Res Judicata of Divorce Judgments: The Court of Appeals was wrong in its view ROPA changed longstanding Michigan law when challenging the husband's paternity of a child born to a married woman. ROPA added only the ability to challenge the husband's paternity during an ongoing marriage (the *Girard* scenario). It did not alter the mother's pre-existing ability to challenge the husband's paternity in divorce proceedings nor termination of that option upon entry of a divorce judgment.

In *Baum v Baum*, 20 Mich App 68; 173 NW2d 744 (1969), the Court of Appeals held that a child support order in a divorce judgment, although uncontested, was an adjudication of paternity with full *res judicata* effect. The support obligor could not later seek to disestablish his paternity of the child. Plaintiff incorrectly argued below that *Baum* was abrogated by this Court's decision in *Serafin v Serafin*, 401 Mich 629, 632-33; 258 NW2d 461 (1977). *Serafin*, and its abrogation of Lord Mansfield's Rule, created no common law remedy that could be abrogated by ROPA. Lord Mansfield's Rule was strictly a rule of evidence, not a "common law action," and it was available only in a purely statutory proceeding – a divorce action. MCL

722.1443(10) making "common law actions" unavailable two years after enactment of ROPA is therefore inapplicable to paternity determinations in divorce actions, which are purely statutory.

Before *Serafin*, a spouse in a pending divorce could disestablished paternity of a child born during the marriage using any evidence other than testimony by either party as to non-access. Therefore, *Serafin* addressed type of evidence available to rebut the husband's presumption of paternity. *Serafin* is silent on *res judicata* and whether a determination of paternity in a divorce case is thereafter binding on both parties.

Plaintiff also incorrectly argued below that *Thompson v Thompson*, 112 Mich App 116; 315 NW2d 555 (1982), abrogates the *Baum* rule and holds that a court can accept post-divorce evidence from the husband to disestablish his paternity of a child born during the marriage. *Thompson* has one very unusual fact that distinguishes it from *Baum* and also from the instant case.

In *Thompson*, the parties were divorced before *Serafin* was decided. The husband testified during the divorce action he was not the father of one of the three children born during the marriage ["Plaintiff contended that Tyrone was not his son, as he had at the time of the original divorce proceedings"]. *Id*, 112 Mich App at 117. Because Lord Mansfield's Rule was still in effect, the husband's testimony of non-access was not proper

evidence and the court was powerless to declare the child not "of the marriage" and relieved the husband of his support obligation.

After *Serafin* was decided by this Court, the husband asked that the claim of non-paternity he asserted in the divorce proceedings be retroactively recognized. The trial court did so and terminated his support obligation for that child. However, the trial court refused the father's request for reimbursement of past support payments. The husband appealed. The only issue decided on appeal was whether the husband was entitled to reimbursement from the mother of his past child support payments. This Court of Appeals said no. Nothing in *Thompson* reversed or abrogates the rule that a party must challenge paternity ***at the time of divorce***.

In both the trial court and on appeal, plaintiff failed to mention *Cogan v Cogan*, 119 Mich App 476; 326 NW2d 414 (1982). *Cogan* was decided after *Thompson*. It is a resounding affirmation of the *res judicata* rule described in *Baum*. In *Cogan*, "[t]he parties' marriage was terminated by a judgment of divorce entered on April 26, 1978. The judgment was entered after proceedings in which various matters were contested but in which defendant admitted paternity of the parties' two minor children." 119 Mich App at 477. Three years later, the defendant-husband moved to determine paternity of one child alleging that he was not the child's biological father.

The trial court, expressly relying on *Baum*, held that the husband's motion was barred by *res judicata* and estoppel. The Court of Appeals

affirmed, holding that defendant made no showing sufficient to be relieved from the paternity finding implicit in the divorce judgment. Defendant's appeal was found to be vexatious, holding that "[d]efendant's position on appeal is indefensible under any conceivable theory." 119 Mich App at 479. *Cogan* remains good law. It was cited in *In re Cook Estate*, 155 Mich App 604; 400 NW2d 695 (1986), which held at 609:

> The doctrine of *res judicata* applies to default judgments and consent judgments as well as to judgments derived from contested trials, and includes every point properly the subject of the litigation which the parties could have brought forward at the time.

Post-*Serafin*, the question of the husband's paternity of a child born during the marriage is "point properly the subject of the litigation which the parties could have brought forward at the time" of divorce. Based on the above-cited cases, *Baum* remains valid law in Michigan. Both plaintiff and the Court of Appeals were incorrect in their view that the rule in *Baum* and by extension, this Court's decision in *Hackley*, were not binding.

3. Baum is not "Outdated": Plaintiff argued below that *Baum* is "outdated" presumably because *Serafin* expanded the type of evidence of non-paternity that may be presented during divorce. That issue was squarely before this Court and addressed in Justice Boyle's plurality opinion in *Hackley*. Justice Boyle rejected the assertion (made by plaintiff below) that the doctrine of *res judicata* should not apply to paternity determinations in divorce cases "because of subsequent changes in the legal climate affecting

the evidence admissible on the issue of paternity." *Hackley*, *supra*, 426 Mich at 584. This was a reference to *Serafin* and the abrogation of Lord Mansfield's Rule. Despite *Serafin* opening the door to a new form of evidence, specifically spousal testimony of non-access, the ability to present such evidence is available only before entry of a divorce judgment. Per *Hackley*, the door remains closed to challenging the husband's paternity ***post-divorce***.

Michigan law is well-established that parties to a divorce cannot, after entry of a judgment, attack the paternity determination made in that judgment. *Cogan and Hackley*, involved former husbands desiring to disestablish paternity of children born during the marriage. Under any view of equal protection, that restriction would apply equally to a mother who wants to remove her former husband from the life of the child they raised together.

Hackley quoted from *Gursten v Kenney*, 375 Mich 330; 134 NW2d 764 (1965), in holding at 585:

> In Michigan, the doctrine of *res judicata* applies, except in special cases, in a subsequent action between the same parties and 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

Plaintiff consistently admitted that she was having intimate relations with Mr. Witt during her marriage to defendant, and particularly when the

child was conceived. If plaintiff believed, as she undoubtedly did well before she filed her complaint for divorce, that Witt was the child's father, she had to pursue that claim in the divorce action. MCR 2.203(A) states that a pleader must join every claim that the pleader has against the opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. The rule applies to claims both legal and equitable.

Plaintiff knew of the facts and the claim, but did not include it in her complaint or file an amended complaint. Nor did she move to determine paternity during the divorce proceedings. All of the claims plaintiff possessed against defendant arising out of the marriage, including her claim under ROPA, were merged together in the divorce judgment and thereby extinguished. This result is made clear in the "acknowledgment" and "waiver" provisions in the judgment. Had plaintiff "exercised reasonable diligence" the issue of paternity of the child "could have been brought forward at the time" of the divorce?

4. The Importance of Finality in Family Litigation: Finality is important in all litigation, but particularly in family litigation. As stated in *Hackley*, *supra*, 426 Mich at 598:

> There is no area of law requiring more finality and stability than family law: 'Public policy demands finality of litigation in this area to preserve surviving family structure.' *Ex parte Hovermale*, 636 SW2d 828, 836 (Tex Civ App, 1982); *McGinn v McGinn*, 126 Mich App 689, 693; 337 NW2d 632 (1983).

The Court of Appeals acknowledged that until enactment of ROPA, "it had been repeatedly recognized that a support order arising from a divorce decree constituted an adjudication of paternity and, consequently, the doctrine of res judicata precluded a party to the divorce from later challenging paternity." 210a. Without citing authority, the panel nonetheless determined that ROPA, which neither expressly or implicitly abrogates *res judicata*, wipes clear many decades of legal authority. While it may be true that "the Legislature clearly evidenced an intent to allow relitigation or reconsideration of paternity in certain circumstances," a post-divorce motion to disestablish a husband's paternity of a child born during the marriage is not one of those circumstances.

The Court of Appeals mistakenly determined that application of *res judicata* was an all or nothing proposition, irrespective of the circumstances. It held, "it would nevertheless clearly subvert the Legislature's intent if we employed *res judicata* as a categorical bar to all litigation of paternity where paternity had been previously determined by a court, or could have been previously decided." 211a. The Legislature already solved that problem by expressly stating under what circumstances a prior court determination could be challenged. Those circumstances are set forth in Section 9 of ROPA.

Nothing in Section 11 of ROPA, the provision under which plaintiff sought relief, permits relitigation of a court determination of paternity.

5. Related Concepts of Equitable / Judicial Estoppel: Although the Court of Appeals acknowledged the equitable/judicial estoppel arguments made by defendant in the trial court and in his brief below, it failed to address these issues in its decision. They are worth addressing here because of their close relationship to the res judicata question the parties were asked to brief.

"Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Bergan v Bergan*, 226 Mich App 183, 187; 572 NW2d 272 (1997).

Equitable estoppel precludes a party from asserting or denying the existence of facts inconsistent with facts the she previously induced another party to believe, *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999), or from otherwise challenging the consequences of her own inaction. *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 124; 346 NW2d 911 (1984). Equitable estoppel should have barred plaintiff from taking any action to disestablish

defendant's paternity after she fully participated in causing entry of the divorce judgment that declared defendant to be the child's father.

Besides equitable estoppel, plaintiff should have been barred by the doctrine of judicial estoppel from denying defendant's paternity of the parties' child. "Under the 'prior success model' of judicial estoppel, 'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 480; 822 NW2d 239 (2012). "Judicial estoppel . . . 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id*, 296 Mich App at 479.

During the divorce proceedings, plaintiff asserted that defendant was the child's father and that defendant should therefore be required to fulfill all of the obligations and to enjoy all of the privileges attendant to his fatherhood. Plaintiff's assertions were unequivocal and they were accepted as true by the trial court and incorporated by agreement into the divorce judgment. The doctrine of judicial estoppel therefore precluded plaintiff from asserting an inconsistent position in the lower court in her motion to revoke defendant's paternity.

The parties divorce judgment contains a mutual waiver and release clause that states:

> IT IS FURTHER ORDERED AND ADJUDICATED that upon entry of this Judgment, each of the parties hereby release the other from any cause of action that either may have against the other for any incident which may have occurred prior to the entry of this Judgment of Divorce, whether that claim be founded in contract, tort or any other basis, except for fraud or misrepresentation in connection with the disclosure or transfer of assets in this divorce proceeding.

54a.

A court should enforce a valid waiver clause within the agreed-upon provisions of a divorce judgment *Sweebe v Sweebe*, 474 Mich 151, 156; 712 NW2d 708 (2006). A "waiver is the intentional relinquishment of a known right.'" *Id* at 474 Mich 156–157. "[A] waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Id*.

The language of the judgment is broad, leaving no room for exceptions. *Shay v Aldrich*, 487 Mich 648, 660–661; 790 NW2d 629 (2010). Under the plain language in the mutual waiver and release provision of the parties' judgment, plaintiff waived her claim under the Revocation of Paternity Act and violated the express terms of the judgment when she filed her motion.

6. Conclusion: This is an unfortunate situation for all involved. But only defendant and the child are innocent here. The heartache all will feel is solely the doing of plaintiff and Mr. Witt. Mr. Witt is not a party to these proceedings. Plaintiff, although a party, has neither a legal nor an equitable

claim for relief. The Court of Appeals was wrong in determining that ROPA rendered *res judicata* in applicable to these facts.

The trial court correctly determined that ROPA provided no statutory remedy for plaintiff. Looking to the common law, the trial court also correctly determined that the doctrine of *res judicata* barred relitigation of the paternity determination in the judgment. The Court of Appeals should be reversed and the trial court should be affirmed.

Conclusion / Relief Requested

Neither plaintiff nor the Court of Appeals were satisfied with the plain language of the Revocation of Paternity Act. At plaintiff's request, the Court of Appeals legislated from the bench and read into the statute a remedy that do not exist in its text. The trial court refused to look beyond the words provided by the Legislature. The trial court's approach was correct and should be affirmed. The Court of Appeals should be reversed for expanding ROPA remedies beyond what the Legislature intended.

ROPA gave plaintiff a remedy (or more accurately codified a remedy that already existed), but she chose not to seek it when it was available. Instead, she played fast and loose with the truth and participated in entry of a divorce judgment containing a paternity finding she knew, or had strong reason to suspect, was false. What is done cannot, on these facts, be undone. The trial court should be affirmed.

Even if this matter is remanded to the trial court for further proceedings under ROPA, the trial court will first be asked to dismiss plaintiff's motion for failure to satisfy a crucial threshold. While this case was pending in the Court of Appeals, the published decision in *Parks v Parks*, 304 Mich App 232; 850 NW2d 595 (2014), was released. As stated at p 239 of *Parks*: "MCL 722.1441(1)(a)(ii) thus requires that the presumed father, the alleged father, and the child's mother must at some time mutually and openly acknowledge a biological relationship between the alleged father and

the child." There must at some point in time be a contemporaneous mutual acknowledgement.

Other than citing *Parks* for the appropriate standard of review, the Court of Appeals did not address the substantive holding in *Parks*. Instead, the panel attempted to side-step the threshold question by referencing an alleged email in which "defendant arguably acknowledged Witt's biological relationship with the minor child." 204a. As explained below, the record does not support a finding that plaintiff met the threshold.

Plaintiff delivered the shocking allegation to defendant that he was not his daughter's biological father in a telephone call in a telephone call at 10:27 p.m. on May 19, 2013. An initial email from defendant to plaintiff concerning the child's paternity was sent just three days later on May 22, 2013, at 7:44 p.m. The email cited by the Court of Appeals in its decision was from defendant to plaintiff's counsel and followed just five days later on May 27, 2013, at 6:51 p.m. This was while defendant was still under the influence of this disturbing news and before he could consult with legal counsel.

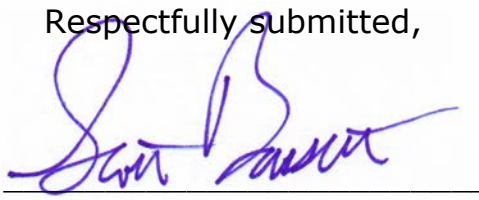
The communication was made privately by defendant to plaintiff's counsel. It did not involve Mr. Witt, and therefore cannot serve as the required "mutual and open" acknowledgement by defendant, plaintiff, *and Witt* of a biological relationship between the child and Witt required by MCL 722.1441(1)(a)(ii). As stated in *Parks*, *supra*, 304 Mich App at 239, "MCL

722.1441(1)(a)(ii) thus requires that the presumed father, the alleged father, and the child's mother must at some time mutually and openly acknowledge a biological relationship between the alleged father and the child." This means there must at some point be a contemporaneous mutual acknowledgement. Here, that acknowledgement is absent.

Once defendant consulted with counsel, he steadfastly maintained that he was the child's father. At no time during this litigation did defendant acknowledge that Witt is the child's biological father nor that defendant is not the child's father. Nor is there anything on the record from Witt acknowledging his paternity of the child. No finding was made that the threshold requirement of MCL 722.1441(1)(a)(ii) was satisfied. If this threshold is not satisfied, *Parks* controls. On remand, if one is necessary, the trial court will be obligated to dismiss plaintiff's motion.

Defendant asks this Court to reverse the Court of Appeals and reinstate the order of the trial court denying plaintiff's motion.

Respectfully submitted,



By:_____ Dated: February 16, 2015

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